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77-967
NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1977

ERNEST CROWNOVER and ERNEST CROWNOVER,
surviving spouse of Ardyce Crownover,

Petitioner,

v.

THOMAS KENNEDY, M.D. and THEODORE K.
GLEICHMAN, M.D.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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TO: THE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Respondent, Thomas Kennedy, M.D.,
opposes the Petition for Writ of Certiorari
to review the decision of the Supreme Court
of the State of Colorado, affirming the
judgment of the Colorado Court of Appeals
which affirms the judgment of the trial

court, a court of general jurisdiction within the state court system in the State of Colorado.

Respondent accepts the factual statements in the petition as being accurate as to all matters except the jurisdictional facts.

I.

SUMMARY OF THE ARGUMENT

A. Petitioner did not properly raise the federal question asserted in the petition.

B. The sovereign State of Colorado, through its legislature, may enact a wrongful death statute containing a reasonable time limitation for exercising the right created in order to limit the bringing of stale claims, and such legislative policy is constitutionally permissible.

II.

ARGUMENT

A. Petitioner did not properly raise the federal question asserted in the petition.

Respondent contends that petitioner has not followed the requirements of Supreme Court Rule 23(f) in the petition filed, and is unable to do so because the record is silent with regard to the jurisdictional requirement showing that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Petitioner did not raise any constitutional issue in the District Court, the court of general jurisdiction in the City and County of Denver, State of Colorado.

In the petitioner's brief in the Colorado Court of Appeals, the only issue raised was:

Is plaintiff's amended complaint, as served upon defendant Thomas Kennedy, M.D., barred by the statute of limitations for wrongful death actions.

(See page 1, opening brief of plaintiff-appellant, Colorado Court of Appeals, No. 75-543.)

As part of the argument upon that issue, petitioner tangentially argued:

Moreover, equal protection of the law is a guarantee of like treatment of all those who are similarly situated. *Dunbar v. Hoffman*, 171 Colo. 481 (1970). It is hardly equal treatment to allow some survivors a right of action for wrongful death and not allow other survivors the same action.

(See page 6, lines 14-18, opening brief of plaintiff-appellant, Colorado Court of Appeals, No. 75-543.)

Thereafter, petitioner filed a motion for rehearing and stated:

That due process and equal protection of the law requires that all survivors have an equal opportunity to bring an action for wrongful death when the legislature provides such a right of action.

(See pages 1 and 2, paragraph 3, Motion for Rehearing, Colorado Court of Appeals, No. 75-543.)

Said petition for rehearing was denied by the Court of Appeals and thereafter

the petitioner filed a petition for writ of certiorari in the Supreme Court of the State of Colorado.

In said petition for issuance of a writ of certiorari to the Colorado Court of Appeals, addressed to the Colorado Supreme Court, the sole and only issue presented for review by petitioner was:

II. Question presented for review.

The question presented for review was whether or not the statute of limitations for wrongful death runs from the date of death. That is to say, is petitioner's amended complaint as served upon Thomas Kennedy, M.D. barred by the statute of limitations for wrongful death?

(See page 2, Petition for Certiorari, Colorado Supreme Court.)

After certiorari was granted by the Colorado Supreme Court to the Colorado Court of Appeals, petitioner's opening brief raised one issue as follows:

The question presented for review is whether or not the statute of limitations for wrongful death runs from the date of death. That

is to say, is petitioner's amended complaint as served upon Thomas Kennedy, M.D. barred by the statute of limitations for wrongful death?

(See page 2, Petitioner's Opening Brief, Colorado Supreme Court.)

As part of the argument on that issue, petitioner tangentially argued:

Moreover, equal protection of the law is a guarantee of like treatment of all those who are similarly situated. Dunbar v. Hoffman, 171 Colo. 481, (1970). It is hardly equal treatment to allow some survivors the right of action for wrongful death for a full two years and not allow other survivors the same action.

(See page 7, lines 21-25, Petitioner's Opening Brief, Colorado Supreme Court.)

In the petition for rehearing addressed to the Colorado Supreme Court, after its decision was rendered unfavorable to petitioner, petitioner petitioned for a rehearing on grounds as follows:

It is elementary constitutional law that statutes, in order to comport with due process, must have

a legitimate end accomplished by reasonable means . . . Contrary to the requirements of equal protection, the interpretation of this court as given permits this particular statute of limitations to vary in length with different claimants, and, under certain circumstances, presents a complete bar to a wrongful death action to certain claimants before the cause of action ever arises.

(See page 2, Petition for Rehearing, lines 2-5; 12-17.)

From the foregoing, it appears that the federal constitutional issue was never presented directly or precisely, but only tangentially in argument, and then the precedent authority cited was a Colorado Supreme Court case, not any federal precedent authority.

Further, since the issue of federal constitutionality of the state statute was never raised directly as an issue in either appellate court, neither appellate court decided the merits of the controversy on a federal constitutional issue. The

petition for rehearing in both appellate courts argued the constitutional issue without citation of authority whatsoever.

In the petition for certiorari, addressed to this court, petitioner attempts to comply with Supreme Court Rule 23(f) using facts in the paragraph appearing on page 7 which states:

Petitioner has argued the constitutional matters in the courts below. References are made to these issues in the briefs submitted to the courts by petitioner. The Court of Appeals and Supreme Court did not address the constitutional issues except that the dissenting opinion in the Supreme Court made reference to the constitutional issues involved.

It is in this respect that respondent questions the adequacy of compliance of the petition for certiorari, sufficient to create jurisdiction for this Honorable Court to grant the petition for the writ.

It would be respondent's contention that petitioner abandoned and waived the

constitutional issue now asserted by not submitting the federal constitutional issue to the Supreme Court of Colorado as a separate issue in the petition for writ of certiorari and in the brief in support of the petition for writ of certiorari, and have omitted presenting that issue directly, and having omitted presenting a brief with federal precedent authorities arguing the federal question to the Colorado Supreme Court directly, petitioner cannot raise the federal constitutional issue now in his petition for certiorari addressed to this Honorable Court.

B.

The sovereign State of Colorado, through its legislature, may enact a wrongful death statute containing a reasonable time limitation for exercising the right created in order to limit the bringing of stale claims, and such legislative policy is constitutionally permissible.

At common law an action for wrongful death did not exist, and in Colorado, a right to sue was created by the legislature in 1877.

The act provides that the civil action shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought. (1963 Colorado Revised Statutes, 41-1-2, now referred to as 1973 Colorado Revised Statutes, 13-21-204)

Petitioner's claim that the statute is unconstitutional as a denial of equal protection and due process is a novel contention, and petitioner cites no direct authority of any sort. While

state courts' decisions disagree in their approach as to when, under a statute of this type, the cause of action accrues, it should be pointed out that no majority opinion has based its decision on constitutional grounds.

The statute, a statement of public policy of the Colorado legislature, is clear, unambiguous and means precisely what it says.

All actions . . . shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought.

These words require no constitutional construction so as to arrive at a different rule, such as the "discovery" date, because to do so is merely to ignore the plain words of the legislative statement of public policy.

It is the duty of a court to sustain a legislative enactment unless its

invalidity is demonstrated beyond a reasonable doubt. Cooley, Constitutional Limitations, 8th Edition, 334, 371; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 55 L.Ed. 369, 377, 31 Sup.Ct.Rep. 337, Ann.Cas. 1912C, 160.

One who assails the classification made in a legislative enactment carries the burden of showing that it does not rest upon any reasonable basis and is palpably arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 78, 55 L.Ed. 377, 31 Sup.Ct.Rep. 337, Ann.Cas. 1912C, 160; Louisville & N. R. Co. v. Melton, 218 U.S. 36, 54 L.Ed. 921, 47 L.R.A. (N.S.) 84, 30 Sup.Ct.Rep. 676.

Respondent further argues that the two year statutory limitation of the wrongful death right of action from the date of the negligence expresses a policy

favoring defendant's interest in repose and should be interpreted accordingly, because such power is within the undeniable power of the legislature, and it has expressed its intent clearly to strike down all stale claims, meritorious as well as frivolous.

Counsel for petitioner supplies the court in its petition with a quotation from Wilson v. Iseminger, 185 U.S. 54, 46 L.Ed. 804, 22 S.Ct. 573 (1902) which includes a quotation from Cooley, Constitutional Limitations, 5th Edition, 448. A reading of Cooley's work indicates that the quoted portion refers to personal property in the possession of another; thus, it is not entirely applicable to a wrongful death limitation. In addition, counsel do not cite the balance of the paragraph which gives the full context of author Cooley's remarks. The balance of

the paragraph is as follows:

It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.

But, as was stated in Clark v. Gulesian, 429 F.2d 405 (1970) (cert. denied 91 S.Ct. 461, 400 U.S. 993, 27 L.Ed.2d 441):

Whether the statute runs from the time of the wrongful act or from the time of the discovery of the wrongful act is a policy decision. The rights are not one-sided. Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest

in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.

The Colorado legislature established two years as its judgment of reasonableness as to the time within which a wrongful death action should be brought, and measured it from the date of the act or neglect which caused the death for which suit is brought.

Petitioner does not claim that the two year limitation is unreasonable, and has not asked any court to review that reasonable limitation, because all that is necessary from a constitutional standpoint is that the limitation period be reasonable. See Terry v. Anderson, 95 U.S. 628, 632, 633, 24 L.Ed. 365 (1877); Hargraves v. Brackett Stripping Mach. Co.,

317 F.Supp. 676; Botzet v. Spencer,
362 F.Supp. 177; and McKinney v. Armco
Recreational Products Inc., 419 F.Supp.
464.

Petitioner has not argued to this court that the limitation of two years is an unconstitutional length of time within which to bring an action for wrongful death under the facts of this case, but merely argues hypothetically that someone, some day, under some circumstances might be foreclosed from bringing a claim within the two year limit.

Access to the courts is only denied to all who fail to bring suit within the time limit provided by the statute which created that right. Such a legislative judgment is not constitutionally impermissible. Clark v. Gulesian, supra.

III.
CONCLUSION

Petitioner's hypothetical constitutional issue of denial of due process and equal protection of the laws has not made out a case of actual controversy involving petitioner's own rights under a valid wrongful death statute enacted by a state legislature which establishes a valid public policy that claims must be made by all who have claims within two years of the date of the negligent act or they are barred.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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